United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

No. 75-4141

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ITT CONTINENTAL BAKING COMPANY, INC., *Petitioner*,

v.

THE FEDERAL TRADE COMMISSION, *Respondent*.

TED BATES & COMPANY, INC., *Petitioner*,

v.

THE FEDERAL TRADE COMMISSION, *Respondent*.

On Petitions for Review of Orders of the Federal Trade Commission

REPLY BRIEF FOR PETITIONER ITT CONTINENTAL BAKING COMPANY, INC.

LAWRENCE M. MCKENNA
WORMSER, KIELY, ALESSANDRONI, MAHONEY & MCCANN
100 Park Avenue
New York, New York 10017

JOHN H. SCHAFER
STEPHEN C. ROGERS
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

Attorneys for Petitioner ITT Continental Baking Co., Inc.

Of Counsel:

GORDON A. THOMAS
ITT CONTINENTAL BAKING COMPANY, INC.
Halstead Avenue
Rye, New York 10580

December 12, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER ITT CONTINENTAL BAKING COMPANY, INC.

On these petitions for review of a cease and desist order of the Federal Trade Commission, the Commission has not challenged major premises upon which Petitioner ITT Continental Baking Company, Inc. seeks reversal of that order. In fact, on the threshold issue presented by these petitions, the Commission's *sub silentio* concessions leave virtually no basis upon which the order can be affirmed. The Commission's contentions on other issues are unpersuasive, and, as we show below, its order against ITT Continental must be reversed.

I.

THE ORDER BELOW MUST BE REVERSED BECAUSE IT RESTS ON A THEORY OF VIOLATION AS TO WHICH NEITHER ADEQUATE NOTICE NOR OPPORTUNITY TO BE HEARD WAS AFFORDED.

In our opening brief, we argued that the Commission committed reversible error by basing its sweeping cease and desist order upon a theory of violation as to which ITT Continental was not afforded adequate notice or an opportunity to be heard. Pet. Br. 15-22, 38-39.[1] That theory, first unveiled when the Commission issued its decision, was that the advertising for Wonder Bread challenged in this case falsely represented to the consuming public generally that Wonder was "an extraordinary food for producing dramatic growth in children." *See id.* We demonstrated that paragraph 10 of the Commission's complaint (Complaint ¶ 10 (1 App. 23)), which contained this quoted language, actually alleged an entirely different violation of law; that is, an "exploitation of children" by making the asserted false representation only to children—*not* to consumers in general—which would have adverse emotional impact on children. Pet. Br. 6-12.

These contentions appear unchallenged by the Commission in nearly every material respect. Thus, the Commission does not dispute that paragraph 10 of the complaint contained no allegation concerning the meaning of Wonder's advertising to adults and that no such issue based on paragraph 10 was litigated at the hearing below. *See* FTC Br. 28-30. The Commission therefore cannot contend that ITT Continental was afforded adequate notice of and opportunity to be heard on the question whether the challenged advertising represented to consumers generally that Wonder was "an extraordinary food for producing dramatic growth in children." Nor does the Commission deny

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[1] ITT Continental's opening brief is referred to in this brief as "Pet. Br." and the Commission's answering brief is cited as "FTC Br.". Other abbreviations and citations are as described in Pet. Br. 3 n.3.

that entry of an order in this case based upon adjudication of such an issue would have violated basic procedural rights of ITT Continental and would constitute reversible error. *See, e.g., National Realty & Constr. Co.* v. *Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1267 n.40 (D.C. Cir. 1973); *Stanley Works* v. *FTC*, 469 F.2d 498, 508 n.24 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973); *Bendix Corp.* v. *FTC*, 450 F.2d 534, 542 (6th Cir. 1971); *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968); 5 U.S.C. § 554(b) (1970). *See also* Pet. Br. 16-18.

Conceding these important points *sub silentio*, the Commission claims instead that the opinion it issued on reconsideration makes clear that "the Commission *only* considered the Paragraph 10 allegation as a deception of children . . . ." FTC Br. 29-30 (emphasis added). It goes on to argue that evidence concerning the meaning of the advertising to adults was "only a factor that the Commission considered" in concluding that the advertising was deceptive to children. FTC Br. 31.

These contentions seem at least as widely divorced from the opinions the Commission rendered below as those opinions were from the issues raised by the complaint and litigated at the hearing. The Commission cites nothing in its original opinion of October 18, 1973 that suggests that the violation upon which its order is based was limited to an alleged deception of children. As we have previously shown, that opinion, and the Commission's findings of fact, conclusions of law and order entered, make completely clear that the violation found went far beyond an alleged deception of children and that the original adjudication explicitly included a finding of deception of the consuming public in general. *See* Pet. Br. 18-19 & n.17.

Even the opinion on reconsideration, upon which the Commission now exclusively relies, makes clear that the order in this case is based on the indefensible conclusion that the paragraph 10 representation was made to con-

sumers generally and not merely to children. There, the Commission explicitly admitted that it had made such a finding in its original opinion. Opin. on Recons. 2 (1 App. 273). Citing to the discussion of the paragraph 10 question in its original opinion, the Commission went on to state that it had relied on evidence "that these advertisements were deceptive to the *entire* audience viewing them." *Id.* (emphasis added).

Moreover, in the opinion on reconsideration, the Commission made its only attempt to justify the particular provisions of its order. As previously noted (Pet. Br. 19), it did not do so, however, on the basis of a violation consisting of deception of children. To the contrary, it affirmatively appears even from this second opinion that the order under review was based on the Commission's finding as to adults.[2] Indeed, the breadth and scope of the order under review obviously could not be sanctioned on a finding limited to deception of children. Under the circumstances, there is a truly Alice-in-Wonderland quality to the claim that all the Commission did was to consider evidence as to the meaning of the advertising to adults as relevant to the issue of its meaning to children.[3]

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[2] In addition to the example given in Pet. Br. 19, the opinion on reconsideration purported to justify paragraph I(3) of the Commission's order in part on grounds of "the importance to children and *consumers* of correct nutritional information." Opin. on Recons. 5 (1 App. 276) (emphasis added). Moreover, the reference, in the same passage of the opinion, to "millions of dollars of sales" that the challenged advertising is claimed to have involved could only contemplate a violation based on alleged deception of the general consuming public, particularly in view of the uncontested evidence, cited in the Commission's brief before the D.C. Circuit (at p. 5), of the minimal influence that children exert on bread purchases. *See* 2 App. 387.

[3] The Commission intimates in this connection (FTC Br. 28-29) that the decision in Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970), *required* it to consider whether the paragraph 10 representation was made to adults. Of course, nothing in *Cinderella* authorizes the Commission to violate a respondent's due process rights by basing an order on findings on issues as to which no notice has been afforded.

There is no merit to the claim (FTC Br. 29 n.16) that, in its opinion on reconsideration, the Commission addressed itself to the defect in its original adjudication and did not add an entirely new ground for decision. The defect here was the adjudication of an unlitigated question that no one could possibly have known was an issue in the case until the Commission issued its first opinion. The denial of procedural rights that this adjudication necessarily entailed was not remedied in any fashion in the opinion on reconsideration. Moreover, the dubious proposition that advertising that would mislead adults would, *a fortiori*, mislead children (*see* pp. 11-12, *infra*), had never previously been advanced to support paragraph 10. This proposition, which has now become the linchpin of the Commission's entire position, appeared for the first time in the opinion on reconsideration. In short, the passage of the Commission's opinion on reconsideration now relied on was not simply an impermissible effort at "repair carpentry." *Braniff Airways, Inc.* v. *CAB*, 379 F.2d 453, 467 (D.C. Cir. 1967). *See also* Pet. Br. 19 n.19. It was an indefensible *post hoc* effort to avoid the defect in the adjudication and not in any way to address, much less remedy, that defect.

The Commission denies that the conclusion as to the meaning of the advertising to adults was the basic premise upon which the advertising was found deceptive as to children.[4] The Commission does admit, however, that it was at least "a factor that the Commission considered" on the question of the meaning of the advertising to children. FTC Br. 31.

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4 The Commission claims that it considered the testimony of psychiatrists as confirming its conclusion on the paragraph 10 question (FTC Br. 31), but this was evidently not the case. *See* pp. 13-14, *infra*.

For the Court's information, Dr. Mendelsohn, whose testimony was cited in the Commission's opinion (FTC Opin. 18 n.18 (1 App. 216)) was presented as an expert in mass communications (Tr. 1868) and was not a psychiatrist. In any event, the Commission appears to have abandoned any reliance on Dr. Mendelsohn's views.

This concession by itself requires reversal, for agency action cannot be sustained even if all that appears is that the action "*may* have been affected by plainly invalid grounds . . . ." *Dietrich* v. *Tarlton*, 473 F.2d 177, 179 (D.C. Cir. 1972) (emphasis added); *see, e.g., Braniff Airways, Inc.* v. *CAB*, 379 F.2d 453, 466 (D.C. Cir. 1967). It has also been said that "the doctrine [of harmless error] must be used gingerly, if at all, when basic procedural rights are at stake." *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 n.16 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1970).

An additional legal issue is whether the Commission could lawfully have based an order on paragraph 10 in the absence of finding the advertising "exploitive" of children as well as deceptive to them. As the Court will recall, the Commission actually dismissed the exploitation allegation of paragraph 10. FTC Opin. 21-22 (1 App. 219-20).

There is no ambiguity on this point in paragraph 10 of the complaint. *Cf.* FTC Br. 27. Even a cursory reading of the charge discloses that it required proof of both "exploitation", which was the gist of the allegation, and of a false portrayal causing that exploitation. As such, it (and paragraphs 11 and 15 of the complaint) charged something other than a violation consisting of a conventional misrepresentation. Rather, these paragraphs plainly advanced a novel legal theory of a Section 5 violation predicated upon that statute's proscription of "unfair . . . acts or practices in commerce." 15 U.S.C. § 45(a).[5]

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[5] Recent theories of "unfair" as opposed to false advertising apparently began to develop at the Commission with the issuance, in July 1970, of the complaint in *In re* Pfizer, Inc., 81 F.T.C. 23 (1972). The "exploitation" allegations of the complaint here were clearly designed to establish a new legal theory of Section 5 violations based upon the power of the Commission to interpret the broad statutory standard of "unfairness" and to apply it to particular conduct. *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

By dismissing the "unfairness" allegation of paragraph 10 and treating that charge as one of conventional misrepresentation, the Commission clearly did "change theories in midstream" in the very fashion that the courts have condemned in the past. *E.g., Bendix Corp.* v. *FTC*, 450 F.2d 534, 542 (6th Cir. 1971); *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968). At the very least, none of the cases cited by the Commission, or any other authority we know of, holds that the Commission can enter an order solely on the basis of a complaint allegation the gist of which it has dismissed.

The rights to notice and an opportunity to be heard are, of course, of constitutional dimensions. These due process rights are expressly guaranteed to respondents in Commission adjudications by the Administrative Procedure Act, 5 U.S.C. § 554(b), (c). They have been recognized as fundamental to fair administrative decision-making by this and other courts. *See* Pet. Br. 16-17. There can be no question but that ITT Continental was deprived of these basic rights by the Commission's handling of paragraph 10 and that it was prejudiced by that deprivation. *See* Pet. Br. 21-22. Under these circumstances, the Commission's order cannot be sustained.

II.

THE CHALLENGED ADVERTISING FOR WONDER BREAD WAS NOT UNLAWFUL.

The Commission's contentions concerning the meaning of the challenged advertising to adults require little discussion here. They are, for the most part, simply reiterations of points made in the Commission's opinion and accordingly have already been dealt with in our opening brief. Pet. Br. 22-33.

It nonetheless bears noting that the Commission appears to be seriously arguing that the challenged advertising had

the capacity of leading consumers to believe that consumption of Wonder would cause instantaneous growth in children. FTC Br. 38 & n.25.[6] The Commission maintains that the fantasy aspect of the advertising would not have been obvious to all consumers (FTC Br. 38 n.25) and that the "verbatim responses" actually indicate that six percent of the consuming public understood the challenged advertising to state that a child might suddenly shoot up in size as a result of consumption of Wonder bread. FTC Br. 42.[7] The Commission actually seems to argue that one of these responses—presumably that of a consumer, who stated that Wonder would help children grow ten feet tall—reflected *literal belief* in the fantasy growth sequence. FTC Br. 42 n.29.[8]

These conclusions are so incredible, and so contrary to everyday experience, that the contentions (*e.g.*, FTC Br. 37, 42 n.29) that these are permissible inferences cannot be seriously entertained. At the least it is clear that the Commission is now arguing for a revolutionary change in the legal standards that heretofore have governed the lawfulness of advertising. *See* Pet. Br. 31. Although these standards do not require proof of actual deception, they do require that there be "a likelihood or fair probability that the [consumer] . . . will be misled." *Ger-Ro-Mar, Inc.* v.

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[6] Thus, the Commission states that the advertising was filled "with key words . . . that implied that Wonder bread was an extraordinary food for providing dramatic growth, the *kind provided in the* [fantasy growth] *sequence.*" FTC Br. 38 (emphasis added). The growth sequence was the aspect of Wonder's advertising that depicted, through a routine photographic technique, a small child growing to the size of a 12-year-old in a few seconds of Wonder's television commercials.

[7] The Commission is simply wrong in its assertion (FTC Br. 40 n.28) that the roughly 600 verbatim responses that the Commission disregarded involved advertising stressing "freshness" or that did not otherwise have a nutritional theme. *See* Jackson 2446-47 (2 App. 415-16).

[8] In its opinion, the Commission cited this response as indicating "face value" acceptance of the challenged advertising. FTC Opin. 19 n.19 (1 App. 217).

FTC, 518 F.2d 33, 38 (2d Cir. 1975); *FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963). Moreover, the Commission appears to be requesting this Court to do precisely what it previously has said flatly it was *not* prepared to do; that is, to attribute to the consumer, "not only a careless and imperceptive mind but also a propensity for unbounded flights of fancy." *Id.* at 676. Yet, no justification was offered below, or is advanced here, for such a radical departure from existing legal principles. *See also* Pet. Br. 25.

The Commission does quote the familiar passage from an earlier decision that ". . . The law was not 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous.'" FTC Br. 39 *quoting Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676, 679 (2d Cir. 1944).[9] It was to this very principle that the Commission referred in *In re Kirchner*, 63 F.T.C. 1282 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964) and again more recently in *In re Pfizer, Inc.*, 81 F.T.C. 23 (1972). In both these decisions, the Commission recognized that the principle of *Charles of the Ritz* "loses its validity . . . if it is applied uncritically or pushed to an absured extreme. . . ." 81 F.T.C. at 65; 63 F.T.C. at 1290. These same Commission decisions also clearly state that an unreasonable misunderstanding of advertising on the part of an unrepresentative segment of the public may not serve as a predicate for a finding of misrepresentation. *See id.*

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[9] The Commission's reference (FTC Br. 39 n.26) to children in connection with this quotation also suggests that it has drifted entirely out to sea, or at least many leagues from the moorings of past Commission and judicial decisions. None of these remotely implies, as the Commission is now asserting in substance, that the meaning of advertising to "the public" is to be measured by the possible perceptions of that advertising by very young children. The law has heretofore been exactly contrary. *E.g., In re Pfizer, Inc.*, 81 F.T.C. 23, 65 (1972); *In re Kirchner*, 63 F.T.C. 1282, 1290 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964).

We submit that by its decision below and in its argument to this Court, the Commission has pushed the *Charles of the Ritz* principle to its "absurd extreme" and that its erroneous application of the law in this case requires reversal. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). At the very least, the Commission's decision below represents a radical departure from the principles it set forth in *Kirchner* and *Pfizer* with no explanation advanced for this drastic change in direction. Yet, it is established that

> "[A]n agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."[10]

As for the Commission's findings as to the perception of Wonder's advertising by children, it is first necessary to restore some semblance of the reality of the record on this issue. Contrary to its present contentions (FTC Br. 3, 43, 44), for example, the Commission explicitly found below that "TV commercials containing . . . the fantasy growth sequence . . . [were] *not* shown on children's programs. . . ." Opin. on Recons. 2 (1 App. 273) (emphasis added); *see* FTC Opin. 8-9 & n.10 (1 App. 206-07), FTC Opin. 18 (1 App. 216). Elsewhere in its brief, the Commission admits that these contentions are squarely at odds with its findings below. FTC Br. 44 n.31.[11]

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[10] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1970) (footnotes omitted); *see, e.g.*, FTC v. Crowther, 430 F.2d 510, 514 (D.C. Cir. 1970).

[11] The record does not show, as the Commission asserts (FTC Br. 3), that half of the advertising impressions for Wonder were disseminated on children's programs, and there was certainly no finding that ITT Continental ever adopted such an absurd marketing strategy.

The entire question of the target audience for Wonder's advertising, as well as the potential exposure of children to advertising directed to adults that contained the growth sequence, was fully explained by the testimony of Mr. Richel and by RX 59, which resolved any possible ambiguities in the

As the Commission notes (FTC Br. 43-44), it did enter one finding of fact that explicitly addressed the question how children between the ages of one (!) to twelve would perceive all of the challenged Wonder advertising. FTC Supp. Finding 16 (1 App. 192). On its face, however, that finding falls far short of being a conclusion that children would perceive *any* of the advertising as portraying Wonder as "an extraordinary food for producing dramatic growth."[12]

It is also worth noting, moreover, that it does not follow, as the Commission stated below (Opin. on Recons. 2 (1 App. 273)), that advertising it thought deceptive as to adults would necessarily mislead very young children. In its brief (FTC Br. 38), the Commission stresses the audio portion of Wonder's adult television commercials. There is no reason to suppose, however, that the language from those commercials quoted in the Commission's opinion (FTC Opin. 17-18 (1 App. 215-16)) would even be under-

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testimony which the Commission has cited (and misconstrued). *See* Richel 2731-32 (2 App. 440-41), 2734 (2 App. 442), 2736-37 (2 App. 443-44), 2739-41 (2 App. 445-47), 2743-47 (2 App. 448-52), 2750-52 (2 App. 454-56), 2753-54 (2 App. 457-58); RX 59 (3 App. 531). It is to be noted that neither the Administrative Law Judge nor the Commission ever referred to the testimony cited in the Commission's brief, though both cited that of Mr. Richel. FTC Opin. 8 (1 App. 206); I.D. Finding 147 (1 App. 109). And, the exhibit cited by the Commission as "CX 59" (FTC Opin. 8) (1 App. 206) was obviously intended to be RX 59 since CX 59 was utterly irrelevant to the issue.

Actually, on the target audience question the Commission relied on CX 175 (3 App. 507-15) and CX 176 (3 App. 516-18), which demonstrate that the primary target audience for Wonder's advertising was always adults, though acknowledging that some young children would be in the audience when the advertising was broadcast. *See* CX 175 ¶ 2 (3 App. 508).

[12] The finding, which in any event was not supported by the evidence cited in it, was that children would perceive all of Wonder's advertising "as promising some special growth capacity which would not be available without eating Wonder Bread." The Commission does not appear to dispute that, as pointed out in our opening brief (Pet. Br. 18, 36 n.36), this is an altogether different question from the "extraordinary" and "dramatic" growth charge of paragraph 10.

stood by very young children, much less be misleading to them.

Finally, as is suggested by the discussion above, the law has been clear (at least up to now) that the meaning of advertising primarily directed to adults may not be measured by possible perception of that advertising by young children. *See, e.g., In re Pfizer, supra,* at 65; *In re Kirchner, supra,* at 1290. The only Wonder advertising shown by the record to have been specifically directed to children did not contain the fantasy growth sequence. There was no finding or testimony that such advertising as was directed to children would portray Wonder as "an extraordinary food for producing dramatic growth in children" and, in its Supplementary Findings of Fact, the Commission appears to have concluded that it would not. *See* FTC Supp. Findings 16-17 (1 App. 192). *See also* Pet. Br. 13, n.14.

For these reasons, and the others set forth in our opening brief (Pet. Br. 22-33), the Commission's order should be reversed with instructions to dismiss the complaint.

III.

THE COMMISSION CLEARLY DID NOT ADEQUATELY CONSIDER THE INITIAL DECISION OR THE RECORD IN FINDING THE ALLEGED DECEPTION OF CHILDREN.

The Commission admits that the decision in *Cinderella Career & Finishing Schools, Inc.* v. *FTC,* 425 F.2d 583 (D.C. Cir. 1970) requires it to "consider [the initial decision] and the evidence in the record upon which it is based. . . ." FTC Br. 46. Contrary to the unequivocal direction of the court in that same decision, the Commission is apparently not prepared to admit that

> "if [the Commissioners] . . . choose to modify or set aside [an examiner's] . . . conclusions they must state that they are doing so and they must give reasons for so doing." 425 F.2d at 589.

It is clear that the Commissioners in this case disregarded each of these clear instructions of *Cinderella*.

The Commission's brief makes no express effort to show compliance by the Commission with the latter requirement quoted above. In fact, such compliance could not be shown, for the Commission vacated the detailed findings on the paragraph 10 issues of the Administrative Law Judge without one word of explanation and in exactly the peremptory fashion condemned in *Cinderella*.[13]

Passing this clear defect in its decision, the Commission goes on to claim that it did adequately consider the expert testimony in the record concerning children's perception of the advertising. FTC Br. 47-48.[14] As noted in our opening brief (Pet. Br. 36 n.36), the only evidence of Commission consideration of the expert testimony offered by complaint counsel on the paragraph 10 issues is in Supplementary Finding 16 (1 App. 192) and that finding was not addressed to the issues raised by paragraph 10. *See also* pp. 11-12, *supra*. This fact implies that the Commission actually may have rejected the testimony of these witnesses that very young children would perceive the fantasy growth sequence as a statement of literal fact, even though, as previously noted (Pet. Br. 11-12), it was on the basis of this testimony that Commission complaint counsel presented the paragraph 10 question to the Commission.

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[13] If the point is of any relevance, it is simply not true, as the Commission asserts, that Findings 146-59 of the Initial Decision were concerned only "with the extent to which children would suffer from the deception that would be the result of the advertising and the consequent unfairness." FTC Br. 47 n.34. As previously indicated (Pet. Br. 35-36), these findings embraced a careful analysis of the record developed at the hearing on all the paragraph 10 issues. *See* I.D. Findings 146-59 (1 App. 108-12).

[14] We have dealt above (p. 4 n.3) with the astonishing claim, reiterated by the Commission on this point (FTC Br. 48), that the Commission's decision that the paragraph 10 claim was made to adults constituted adherence to the *Cinderella* doctrine.

The Commission's brief also refers to testimony of Dr. Littner, an expert witness called by ITT Continental. FTC Br. 48 n.35. The Commission did refer in its opinion (FTC Opin. 18 n.18 (1 App. 216)) to some testimony by Dr. Littner but it appears from the Commission's discussion of this testimony that the reference was mistakenly intended by the Commission to support its conclusion as to the meaning of the advertising to adults.[15] A further odd aspect of the Commission's treatment of Dr. Littner's testimony is Supplementary Finding 15 (1 App. 192). There, the Commission explicitly found that complaint counsel's witnesses were qualified to testify as experts on how children would perceive the challenged advertising. For reasons known only to the Commission, however, no such finding was ever made as to Dr. Littner.

At the very least, in the language of the court in *Cinderella:*

> "It is clear that what the Commissioners did here was to review selected parts of the record . . . while ignoring other matters of record. . . . While the Commissioners may arrive at a different conclusion from the examiner and may thus overturn his decision, they may not do so in conformity with the concept of due process unless they have at their disposal as full an appreciation of *all* of the evidence as the person whose decision they are overturning." 425 F.2d at 585 n.3 (emphasis added).

Merely laying the careful findings of the Administrative Law Judge on the paragraph 10 questions along side the cursory and even peculiar treatment of a very small part of the relevant evidence by the Commissioners makes plain that to the extent the Commissioners found a deception of children, they failed to give the Initial Decision and

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[15] *See* Pet. Br. 36 n.36. Further evidence on this point is contained in the Opinion on Reconsideration in which footnote 18 was cited as containing evidence that the challenged advertisements were "deceptive to the entire audience viewing them." Opin. on Recon. 2 (1 App. 273).

the record evidence on which it was based the full consideration required by *Cinderella*.

A more recent decision probably represents a restatement of the teaching of *Cinderella*. *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1970). There, the court said the following about the role of a court reviewing agency action:

> "Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision making." *Id.* at 851.

It is obvious that the Commission here did not take a hard look at the salient problems posed by the Initial Decision and the record concerning the paragraph 10 questions and did not genuinely engage in reasoned decision of those questions. Indeed, there was very little reason for the Commission to do so since, as we have demonstrated, the real basis for its order was its impermissible conclusion as to adults. In any event, the Commissioners plainly spoke on these issues only "as *verbum regis*," in the very fashion condemned by the court in *Cinderella*. 425 F.2d at 588.

IV.

THE COMMISSION'S ORDER IS NOT REASONABLY RELATED TO THE VIOLATION FOUND AND ITS TERMS ARE NOT SUFFICIENTLY PRECISE.

We believe it clear beyond doubt that the Commission's order in this case was based upon its impermissible conclusion that the challenged Wonder advertising falsely represented to adults as well as children that Wonder was an extraordinary food for producing dramatic growth in children. Since this was an issue not fairly presented by the pleadings, and was not litigated, the order must be

reversed for this, and for the other reasons set forth in this and in our opening brief.

At the very least, however, the Commission's order must be modified. It bears no reasonable relation to a violation consisting solely of deception of children or even to a violation consisting solely of a false representation of extraordinary and dramatic growth producing qualities to both children and adults.

At the outset, it is important to note the firmly established rule that this Court "must look to [the Commission's] . . . opinion, not to the arguments of its counsel, for the underpinnings of its order." *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 246 (1972); *see, e.g., NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-44 (1965); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962); *Braniff Airways, Inc.* v. *CAB*, 379 F.2d 453, 465 (D.C. Cir. 1967). As previously shown, examination of the opinions below makes clear that the sweeping order entered was based on the Commission's impermissible conclusions that Wonder's advertising made the paragraph 10 claim to adults as well as children.

At the least, however, the Commission itself never made any effort to justify this order on the basis of a violation consisting solely of an alleged deception of children. Even assuming, as is clearly not the case, that the order could be justified on this basis, the failure of the Commission to attempt to do so below is itself reversible error. Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 557(c)) does not permit an agency to enter an order—even in the exercise of its expert discretion—with "no findings and no analysis . . . to justify the choice made . . . ." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167 (1962), citing *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613-14 (1946).[16] This established principle of

[16] *See also* Baltimore & Ohio R.R. v. Aberdeen & Rockfish R.R., 393 U.S. 87, 92 (1968).

administrative law, without which effective judicial review is impossible,[17] should be strictly enforced as to orders of the Federal Trade Commission in view of the drastic potential penalties for violations of such orders[18] and the inevitably coercive effect on wholly legitimate future conduct that inheres in the potential for such penalties.

In point of fact, as we have previously demonstrated (Pet. Br. 37-46), there is no justification for the order entered in this case on any conceivable theory of violation. The basic argument advanced by the Commission's brief appears to be that the scope of the order may be justified on the grounds that the violation found was "flagrant" (FTC Br. 61) and did not involve "a novel issue which," the Commission admits, "would normally militate against a broad order."[19] Nothing in the record supports the charge that the violation found was flagrant or that it did not present a novel question. In fact, there is affirmative record evidence to the contrary.

In the first place, the violation found could not have been "flagrant" in any sense of the word. It involved no explicit misrepresentation of any kind. To the contrary, the only violation found involved nothing more than an *implied* misrepresentation. FTC Opin. 17 (1 App. 215); Conclusion of Law 2 (1 App. 198). In these circumstances, there can be no possible basis for the claim that the viola-

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[17] Baltimore & Ohio R.R. v. Aberdeen & Rockfish R.R., 393 U.S. 87, 92 (1968); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943). *See also* Stanley Works v. FTC, 469 F.2d 498, 503 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973).

[18] *See* 15 U.S.C.A. § 45(*l*) (Supp. 1974).

[19] FTC Br. 72. *See, e.g.*, Grand Union Co. v. FTC, 300 F.2d 92, 100 (2d Cir. 1962). Various other characterizations in the Commission's brief of the violation found—for example, that it involved "massive deception" (FTC Br. 73) and "the least sophisticated members of society" (FTC Br. 67)—were not asserted as justifications for the order in the Commission's opinions. They therefore must be disregarded here. *See* p. 16, *supra*.

tion was flagrant. Moreover, nothing in the record indicates that the respondents below were even aware of, much less intended, the implicit claim that the Commission found lurking in Wonder's advertising.

Moreover, the record evidence affirmatively shows that novel issues were presented by the complaint and confirms that the violation found cannot be regarded as flagrant. Thus, advertising from the "Wonder Years" campaign challenged in this proceeding was submitted to the Commission during the course of a thorough review of Wonder's advertising conducted by the agency between 1962 and 1965. Thomas 2157-58 (2 App. 397-98); Anderson 2508 (2 App. 429). That investigation was terminated after full review of the basic advertising claims upon the conclusion of the Chief of the Commission's Division of Food and Drug Advertising that the "public interest does not justify . . . corrective action . . . ." RX 34, Memo, of Jan. 11, 1965, at 5 (3 App. 529). *See also* Thomas 2167 (2 App. 401); Anderson 2505-06 (2 App. 426-27). Throughout the period from the end of that investigation until the beginning of the investigation that led to the instant proceeding, no question concerning Wonder's advertising was received by ITT Continental from the Commission even though the content of Wonder's advertising did not substantially change. Thomas 2167 (2 App. 401). *See also* CX 172 ¶ 2 (3 App. 494). Therefore, unless one is prepared to assume that the Commission was utterly shirking its statutory responsibilities from some time before 1965 through 1970, the only permissible inference from these facts is that the issues presented by this case were, indeed, novel and further that if there is violation at all in this case (and there is not), it could not conceivably be considered as flagrant.

It should also be observed that the Commission's brief offers no meaningful response to a basic objection raised

to this order; that is, that it converted a lengthy and expensive adversary proceeding before the Commission into an utterly meaningless exercise. *E.g.*, Pet. Br. 37, 39, 43-44. Having dismissed virtually every aspect of the complaint, the Commission proceeded to write an order that makes it appear that the outcome of its own adjudication had been exactly the opposite. Recognizing that a different, though analogous, question was involved in *Cinderella*, we nonetheless believe that the following passage from that opinion is entirely apposite:

> "the Commissioners are not free to boil over in aggression and completely dismiss those proceedings [at the hearing] either because they are dissatisfied with the outcome, or for any other reason. Such procedure is rooted in nothing and places the Commission in the position of being both the instrument and the musician at the same time. The result, legally, is a ragged and confusing mosaic defying the very archetype of due process, abandoning the merit in hearings of the power of persuasion for the persuasion of power and thereby producing a self-justifying system that makes fairness not really the controlling factor in practice that it seems in metaphor." 425 F.2d at 588-89.[20]

Here, of course, the Commission not only dismissed the proceedings at the hearing; in writing its order, it rendered its *own* adjudications meaningless as well.

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[20] *Cf.* National Dairy Prods. Corp. v. FTC, 412 F.2d 605, 623-24 (7th Cir. 1969), and discussion thereof in Pet. Br. 39-41.

With regard to the product coverage of the order, we find the Commission's reliance (FTC Br. 55) on the consent order in the Profile bread case particularly puzzling. Beyond the fact that such orders are generally entitled to no weight (*see* Brief for Petitioner Ted Bates & Co., Inc., October 15, 1975, at 30-34), the Profile order is completely irrelevant to the argument made at Pet. Br. 39-41 since the advertising involved in that case was not even alleged to have made false nutritional claims. *See In re* ITT Continental Baking Co., Inc., 79 F.T.C. 248 (1971).

One final general point is worth making about the scope of the order under review. If it is based (as it clearly is not) only upon a finding of deception of children, then a broad order is inappropriate for a further reason. As the evidence shows (CX 175 ¶ 2 (3 App. 508)), and the Commission appears to admit (FTC Br. 4), long before the complaint in this case was issued, ITT Continental decided to terminate all Wonder advertising specifically directed to children. Hackett 2124 (2 App. 386). *See also* Richel 2739-40 (2 App. 445-46). The law is well settled that the termination of challenged conduct before issuance of a complaint by the Commission is a fact that is relevant to the permissible breadth of a Commission order. *E.g.*, *R. H. Macy & Co.* v. *FTC*, 326 F.2d 445, 450 (2d Cir. 1964); *Country Tweeds, Inc.* v. *FTC*, 326 F.2d 144, 148 (2d Cir. 1964). *See also Joseph A. Kaplan & Sons, Inc.* v. *FTC*, 347 F.2d 785, 789 n.8 (D.C. Cir. 1965).

With respect to the imprecision of the order's provisions, it is appropriate first to dispose of the suggestion (FTC Br. 75-76) that the compliance advisory opinion procedure available at the Commission represents any cure for an order such as this one that is not "*at the outset*, sufficiently clear and precise . . . ." *FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 368 (1962) (emphasis added). In *Joseph A. Kaplan & Sons, Inc.* v. *FTC, supra*, 347 F.2d at 790-91, the court persuasively demonstrated the fallacy of this contention and the Commission has offered no reason to resurrect the very same argument that was there laid to rest.[21]

Although one need only read the Commission's order to perceive its complete lack of clarity, several things said

[21] It also appears unlikely that this procedure will really be available as to problems that foreseeably may arise under an order such as this one that attempts pervasively to regulate nutritional advertising. The Commission ordinarily will not render compliance advisory opinions where "clinical study, testing or collateral inquiry" is required (16 C.F.R. § 3.61(d)). It seems obvious that the need for such investigations where nutritional claims are involved would frequently arise.

about the order in the Commission's brief illustrate this infirmity even more vividly. For example, the Commission states that paragraph I(1)(a) of the order prohibits certain (indefinable) representations unless they can be substantiated *before* they are made. FTC Br. 64. This argument presumably also applies to paragraph I(1)(c). *See* FTC Br. 65.[22] Nothing in these provisions of the order remotely suggests, however, that they require *prior* substantiation and nothing in the opinions below supports this interpretation. The order proposed by complaint counsel did not seek such a restriction (1 App. 157-60) and the Commission actually purported to have "modified" complaint counsel's proposed order "so as to avoid any undue limitations on respondents' ability to make truthful advertising representations." FTC Opin. 31 (1 App. 229). The Commission's present suggestion that paragraphs I(1)(a) and (c) require prior substantiation is thus completely inconsistent with the statement of the Commission's opinion.[23]

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[22] In this connection, we are at a complete loss to understand the argument made as to our "trial tactics"; that is, that ITT Continental's defense below was that it "did not know that the advertisements were making the misrepresentations found . . . ." FTC Br. 64. In fact, our defense, sustained by the Commission in virtually every respect, was that the advertising did not make the allegedly false claims. Is the Commission *really* suggesting here that the vigorous defense of an advertising case is a factor that is relevant to the sort of order the Commission may enter? Certainly the Commission never advanced below such an inadmissible justification for any provision of this order.

[23] If the Commission's present interpretation of the order were correct, then there would be no relationship at all of these provisions to a purported violation consisting of "false" advertising. Recent Commission decisions are developing the rule that even truthful advertising may be "unfair" advertising in the absence of adequate prior substantiation of claims. *E.g., In re Pfizer, Inc.*, 81 F.T.C. 23 (1972). This, however, is an entirely different theory of violation from the purported "false" advertising found below, and it was never remotely suggested below that such a theory was in the case. Nor, until now, has there been any suggestion that, contrary to the import of the Commission's statement quoted in the text, paragraphs I(1)(a) and (c) require prior substantiation. They clearly do not.

The ambiguity of paragraph I(1)(b) is demonstrated by the example the Commission supplies. FTC Br. 76. Thus, in the Commission's view, to state that a product is "a useful source of protein" would be a comparative nutritional claim requiring the affirmative disclosure called for by paragraph I(1)(b). Surely, in light of this statement, there are "serious questions as to . . . [the] meaning and application" of paragraph I(1)(b). *FTC* v. *Henry Broch & Co., supra,* 368 U.S. at 368.

With respect to paragraph I(1)(d), the Commission does not attempt to defend the possible literal scope of this injunction as it was described by Petitioner Ted Bates & Company, Inc. Brief for Petitioner Ted Bates & Company, Inc., October 15, 1975, at 38-39. Instead, it takes the position, in substance, that this provision of the order comes into play only when an attempt is made "to create the appearance of demonstrating the product or what it can do for the consumer." FTC Br. 78. This is not, of course, what the order itself provides. If the Court finds any justification for an injunction covering "demonstrations" in this case, it should nevertheless not sanction the incomprehensible language of paragraph I(1)(d).

As for paragraph I(2) of the order, the Commission claims that the respondents below failed to challenge this provision before the Commission and are therefore barred from objecting to it here. FTC Br. 66. A substantially similar provision was included in the order that complaint counsel requested the Commission to issue [24] and was specifically objected to by ITT Continental as vague, overbroad and lacking in record support. Answering Brief of Respondent ITT Continental Baking Company, Inc., FTC Dkt. No. 8860, March 20, 1973, at 47. This objection was

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[24] This was paragraph I(1)(h) of complaint counsel's proposed order. 1 App. 158.

clearly sufficient to preserve the point made in our opening brief (Pet. Br. 45) for review by this Court.

The Commission's brief effort to justify paragraph I(3) of the order (FTC Br. 66-67) requires little comment. Neither the authorities (*see* Pet. Br. 45) nor the record (*see* pp. 17-18, *supra*) supports this perpetual injunction against any misrepresentation of the nutritional properties of any food product.

ITT Continental, of course, is confronted with the prospect of a perpetual injunction, which if not modified (as it should be), will govern the advertising for all of its food products, present and future. We would like to believe that, as the Commission intimates (FTC Br. 75), this order will not be interpreted in the abstract 25 years from now and that resort will be had to the record of the proceeding below (which will in any event be unenlightening) and a precise and protective construction will be placed on the sweeping prohibitions of this order. The unfortunate experience of others with changing interpretations of Commission orders makes clear, however, that such a belief would be at best wishful thinking on our part. *See, e.g., Rettinger* v. *FTC*, 392 F.2d 454 (2d Cir. 1968) (where the Commission attempted to change its interpretation of a consent order 10 years after its entry).

In our opening brief, and above, we demonstrated the absence of any reasonable relationship of this order to the limited violation supposedly found below. We submit that paragraphs I(1) and (3) should be entirely stricken and that if sustained at all, paragraph I(2) should be modified and further should be limited to advertising for Wonder that is primarily directed to children. *See* Pet. Br. 45, 46. The Commission's own brief demonstrates, however, that the very least that is required is a complete rewriting of the order in terms that can be comprehended.

V.

CONCLUSION

As we have previously noted (Pet. Br. 21), the complaint in this case posed numerous important and novel issues. As to each one of these that was fairly posed by the pleadings and actually litigated, the Commission was compelled to rule in ITT Continental's favor. Only by torturing paragraph 10 beyond recognition did the Commission manage to salvage any aspect of its complaint, and by so doing, it violated fundamental procedural rights of the respondents. In adjudicating the issue invented, the Commission entered no finding of violation that comports with governing legal principles, reflects an adequate review of the record, or represents reasoned and articulated decision making. By both its adjudication, and by the sweeping and incomprehensible order it issued, the Commission, in the words of one court, "abandon[ed] the merit in hearings of the power of persuasion for the persuasion of power. . . ." *See* p. 19, *supra*. We submit that in every respect mentioned above, the Commission committed reversible error.

For all the reasons assigned in this and our opening briefs, the Commission's order must be reversed and the case remanded with instructions to dismiss the complaint. At the least, the Court should remand for further proceedings not inconsistent with its opinion. Should the Court sustain the Commission's limited finding of violation, it

should require modification of the order along the lines set forth in our opening brief.

Respectfully submitted,

LAWRENCE M. MCKENNA
WORMSER, KIELY, ALESSANDRONI,
MAHONEY & MCCANN
100 Park Avenue
New York, New York 10017

JOHN H. SCHAFER
STEPHEN C. ROGERS
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

Attorneys for Petitioner
ITT Continental Baking Co., Inc.

Of Counsel:

GORDON A. THOMAS
ITT CONTINENTAL
BAKING COMPANY, INC.
Halstead Avenue
Rye, New York 10580

December 12, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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TED BATES & COMPANY, INC., Petitioner, v. THE FEDERAL TRADE COMMISSION Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have today served the Reply Brief of Petitioner ITT Continental Baking Company, Inc. upon all other parties to this case by causing two copies thereof to be hand-delivered, together with a copy of this certificate,

to the following persons:

Denis E. Hynes, Esq.
Office of the General Counsel
Federal Trade Commission
Washington, D.C. 20580

Attorney for Respondent

and

Marshall Cox, Esq.
Cahill Gordon & Reindel
1819 H Street, N.W.
Washington, D.C. 20006

Attorney for Petitioner Ted Bates & Company, Inc.

Stephen C. Rogers

Stephen C. Rogers

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorney for Petitioner ITT Continental Baking Co., Inc.

Dated: December 12, 1975